

No. 82-1496

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In The  
SUPREME COURT OF THE UNITED STATES  
October Term, 1982

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HAROLD CARDWELL and THE ATTORNEY  
GENERAL OF THE STATE OF ARIZONA,

Petitioners,

vs.

LOUIS CUEN TAYLOR,

Respondent.

---

BRIEF IN OPPOSITION TO PETITION FOR  
A WRIT OF CERTIORARI TO THE UNITED STATES COURT  
OF APPEALS FOR THE NINTH CIRCUIT

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Counsel for Respondent

March 16, 1983

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No. \_\_\_\_\_

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## STATEMENT OF THE CASE

The Court of Appeals relied on undisputed facts and findings of historical fact by various state courts to which it applied the proper constitutional standards.

It correctly held that the District Court unduly restricted the scope of inquiry at the evidentiary hearing after remand by refusing to hear argument on, and consider, this Court's decision in Dunaway v. New York, 442 U.S. 200 (1979), which was rendered subsequent to the remand by the Court of Appeals but prior to the hearing in District Court.

### A. Procedures in State Courts

Subsequent to the transfer of the then 16-year-old Respondent from juvenile court for prosecution as an adult, a preliminary hearing was conducted pursuant to Arizona law. On July 8, 1971, the Superior Court judge sitting as a magistrate found that Respondent was a suspect when Officer Adams read him the Miranda rights and excluded all statements thereafter made. [The pertinent portions of this Order appear infra at Appendix 1-2.]

After a voluntariness hearing, the trial court entered an initial Order on October 26, 1971, at which time that court found, inter alia, that Respondent came into custody when advised of his Miranda rights and excluded the statements thereafter made. [The pertinent portion of this Order appears infra at Appendix 3.] This decision was appealed directly to

the Arizona Supreme Court which remanded the cause on other grounds for further proceedings. State v. Hardy, 107 Ariz. 583, 491 P.2d 17 (1971) [Reproduced at Appendix 4-5.]

The Memorandum Opinion and Order of Trial Judge Hardy [Petition at App. 21-27] was entered in 1972, not 1978 as appears in the Petition at App. 27.

#### **B. Proceedings in Federal Courts**

In November, 1975, Respondent filed a Petition for Writ of Certiorari to the Supreme Court of Arizona in this Court [Cause No. 75-5794] which Petition was denied on February 23, 1976. See 47 L.Ed 2d 328.

#### **C. Statement of Facts Relating to Voluntariness**

Certain additional relevant facts adduced at state court pre-trial hearings and at the evidentiary hearing on the Petition for Writ of Habeas Corpus in the District Court are as follows:

Before Officer Adams found Respondent in the hotel and took him to the Tucson Police Department station house, Adams and others spent "exactly 50 minutes" looking for him. [Juv. Hrng., Feb. 4, 1971, at P.595]

Adams then took the Respondent out of the hotel to a police command post set up outside to advise Sergeant Lingham and Lingham told Adams to take Respondent to the police station where detectives would take a statement from him. Adams then escorted Respondent to his police vehicle. Respondent was then frisked by Adams before entering the vehicle. [Memorandum

Opinion and Order of Arizona Superior Court Judge Charles L. Hardy, Jan. 21, 1978 (hereinafter "Hardy Order"), Petition at App. 22]

Further, the trial judge found that:

"From the time that Officer Adams asked him on the third floor of the hotel to step outside until he was admitted to the juvenile detention home, the defendant [Respondent] was never outside the presence of a police officer. He was not requested to go to the police station to give a statement; he was taken. He was not permitted to leave the interviewing room to get a drink of water or go to the restroom; he was escorted. He was escorted to another building for the lie detector test and he was escorted back to the police station." Id. at App. 25

No recording devices were ever utilized, nor was a stenographer ever called upon to record or preserve any of Respondent's statements. [Voluntariness Hrng. in State Court, Oct. 15, 1971, at 205-206; Preliminary Hrng. in State Court, July 2, 1971, at 433; Evidentiary Hrng. Dist. Ct., Nov. 13, 1979, at 62.]

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#### ARGUMENT I

**The Court of Appeals relied on state findings and undisputed facts as required by 28 U.S.C. §2254.**

The Court of Appeals, on the appeal (after remand) from the May 26, 1981, Order of the United States District Court for the District of Arizona [Petition at App. 4], had available to it all of the prior state court opinions issued in this case, the testimony from the November 13, 1979, Evidentiary Hearing in the District Court, and transcripts of

the various voluntariness hearings in the state courts. The Court of Appeals also had an opportunity to consider and apply the decisions of this Court in Brown v. Illinois, 442 U.S. 590 (1975), and Dunaway v. New York, 442 U.S. 200 (1979).

No state court had ever considered these opinions and their relevance to the facts of the instant case. Having before it this wealth of information, the Court of Appeals referred to thirteen "undisputed facts" [Petition at App. 3] which supported its decision that Respondent was in custody before the police had probable cause to arrest him. These facts are:

1. He was a teenager of borderline intelligence.
2. He was seen at the fire and attracted the attention of police because they believed he might have information about the starting of the fire.
3. He was frisked.
4. He went to the back door of the squad car assuming he was in custody.
5. He was placed in the front seat of the police car.
6. He asked why he was being taken to the station.
7. He received no definite answer to this question.
8. He was closely watched from the moment he arrived at the station.
9. He was thereafter surrounded by police officers.
10. He was escorted to the bathroom and water fountain.
11. He was never outside the presence of one or more police officers from the time he was picked up at the hotel.

12. He was not questioned briefly where he was found, but was taken in a police car to a police station where he was questioned in an interrogation room.

13. He was never informed he was free to go.

Fact "1" appears in State v. Taylor, 112 Ariz. 68, 81, 537 P.2d 938 (1975).

Fact "2", Id., 112 Ariz. at 73.

Facts "3", "4" and "5", Id., 112 Ariz. at 73; Hardy Order, Petition at App. 22.

Facts "6" and "7" specifically appear and are reasonably inferred from the quoted testimony of Officer Adams set forth in haec verba in State v. Taylor, supra, 112 Ariz. at 87:

"A. Mr. Taylor asked me why we were going to the station. I explained to him that I understood he was at the scene of the fire and that the detectives would like to talk to him to find out what he had seen or done." [Hearing on Probable Cause, Feb. 4, 1971 at Pp 599-600.]

Facts "8", "9", "10", "11" and "12" pervade the Hardy Order, Petition at App. 21-27, particularly at App. 25.

Fact "13" is gleaned from a reading of all relevant transcripts, decisions and orders. No police officer has ever testified that he advised Respondent that he was free to go.

The Court of Appeals also determined as a fact that, "under all these circumstances, a reasonable person in Taylor's position would not believe that he was free to go." [Petition at App. 3.] This was nothing more than the trial court found as a fact over ten years before:

". . . when Officer Adams read the Miranda rights to the defendant. At that point, the defendant could reasonably have believed he was not free to go. . . ." [Petition at App. 25.]

The trial court recognized that the Miranda warnings may not have been sufficient to overcome the taint of the illegal arrest of Respondent, but went on to find that the statements made after said illegal arrest were nonetheless voluntary. [Petition at App. 26] Naturally, the trial court could not have applied the law set forth by this Court in Brown v. Illinois, ante, decided more than three years later.

Likewise, no decisions from the Arizona Courts at any level considered these historical facts in light of Brown v. Illinois, ante, or Dunaway v. New York, ante, though the opinion of the Supreme Court of Arizona affirming the conviction is dated twelve days after Brown was decided. The Court of Appeals has merely applied, to the aforementioned historical and undisputed facts, the principles set forth in these landmark opinions and found as a matter of law that "[n]o significant event intervened to break the connection between the illegal seizure and Taylor's subsequent statements." [Petition at App. 3]

Brown dealt with whether Miranda warnings given after an illegal arrest suffice to purge the taint arising from the illegal arrest in order to allow the admission of statements thereafter made. Dunaway expanded upon Brown and held that:

"...detention for custodial interrogation--regardless of its label--intrudes so severely on interests protected by the Fourth Amendment as necessarily to trigger the traditional safeguards against illegal arrest." 422 U.S. at 216.

\* \* \*

"Nevertheless, three members of the Appellate Division purported to distinguish Brown on the ground that the police did not threaten or abuse petitioner (presumably putting aside his illegal seizure and detention) and that the police conduct was 'highly protective of defendant's Fifth and

Sixth Amendment rights,' 61 App. Div. 2d, at 303, 402 NYS2d, at 493. This betrays a lingering confusion between 'voluntariness' for purposes of the Fifth Amendment and the 'causal connection' test established in Brown. Satisfying the Fifth Amendment is only the 'threshold' condition of the Fourth Amendment analysis required by Brown. No intervening events broke the connection between petitioner's illegal detention and his confession. To admit petitioner's confession in such a case would allow 'law enforcement officers to violate the Fourth Amendment with impunity, safe in the knowledge that they could wash their hands in the 'procedural safeguards' of the Fifth.' Reversed." 422 U.S. at 218-219. (Emphasis supplied.)

No tribunal prior to the Court of Appeals in its September 15, 1982, decision [Petition at App. 1-4] applied these current Constitutional standards to the undisputed facts established years ago in the Arizona proceedings. Though the state courts found the Respondent arrested when Adams read him the Miranda rights, all determinations of voluntariness were then based solely upon the alleged waiver of those rights, rather than the effect of the obvious absence of probable cause to arrest at that point in time and the taint thereof on later statements. [See State v. Taylor, ante, 112 Ariz. at 81; Hardy Order, Petition at App. 25-26; Trial Court Order infra at Appendix 1-2; and court order infra at Appendix 3.

There is no compelling reason for this Court to again consider its holding in Dunaway; that has recently been done (and Dunaway reaffirmed) in Taylor v. Alabama, \_\_\_\_ U.S. \_\_\_\_, 73 L.Ed 2d 314 (1982). There has been no violation of 28 U.S.C. §2254(d). The Court of Appeals not only applied the "presumption of correctness" to state findings of fact as required by the statute and this Court in Sumner v. Mata, 449 U.S. 539 (1981) and Sumner v. Mata, 455 U.S. 591 (1982), but applied those very facts to current federal law. [See Argument

II, infra.)

This Court should decline further review. None of the Considerations Governing Review on Certiorari promulgated in Rule 17, Rules of the Supreme Court, has been demonstrated, and no other "special and important reasons" have been shown.

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ARGUMENT II

THE ROLE OF FEDERAL COURTS IN REVIEWING MIXED QUESTIONS  
OF FACT AND LAW IN A HABEAS CORPUS PROCEEDING IS CLEAR.

Petitioners argue that this Court should further define the role of a federal court when confronted with a mixed question of law and fact [Petition at P.11], though they fail to demonstrate any confusion with regard to the applicable law in this area. The very case relied upon by Petitioners [the second] Sumner v. Mata, ante, clearly and unambiguously defines the role of the federal courts in habeas corpus proceedings from convictions in State Courts. These requirements were just reiterated in Marshall v. Lonberger, \_\_\_\_ U.S. \_\_\_\_ (February 22, 1983) and Petitioners have failed to manifest a compelling need for further elaboration by the Court in the case at bar.

The ultimate questions as to the constitutionality of the custodial detention of Respondent and the voluntariness of his later custodial statements after receiving the Miranda rights are mixed questions of law and fact that are not governed by 28 U.S.C. §2254. This is so, just as the question of the constitutionality of the pre-trial identification procedures in Sumner v. Mata, were held to be such mixed

questions. However,

"...in deciding this question, the federal court may give different weight to the facts as found by the state court and may reach a different conclusion in light of the legal standard." Id., 71 L.Ed 2d at 486.

The Court of Appeals merely reached a different legal conclusion while giving deference to, and relying on, findings of fact and undisputed facts developed in the state courts. This conclusion is founded upon decisions of this Court rendered subsequent to the decisions in the state trial and appellate courts. In applying the Dunaway and Brown standards, 28 U.S.C. §2254(d) was inapposite. It was properly held that the District Court "unduly restricted the scope of inquiry" at the evidentiary hearing on May 18, 1981. [See Petition at App. 2]

In its Memorandum Opinion, the Court of Appeals recognized that Respondent had raised the Fourth Amendment issue on his first appeal but the Opinion ordering a remand to the District Court [Petition at App. 11-15] for an evidentiary hearing did not address it. [Petition at App. 2.] It was then pointed out that Dunaway had not yet been decided by this Court. [Id.]

If this failure of the Court of Appeals to deal with the Fourth Amendment issue resulted in an "abusive and costly road the application for federal habeas corpus relief can take. . . ." [Petition at 16], then it is not the incarcerated Respondent who should suffer the consequences. For it is clear beyond peradventure that Respondent challenged his illegal arrest and the voluntariness and admissibility of his custodial statements from the earliest proceedings in juvenile court throughout all levels of state and federal courts. The remand

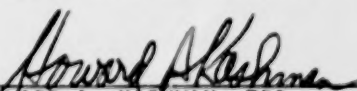
by the Court of Appeals in 1978 was never challenged by Petitioners. They have waived any complaint about it.

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CONCLUSION

Petitioners have failed to demonstrate any special or important reason for this Court to further consider the issue concerning the application of the current constitutional law to the historical findings of fact and undisputed facts or the issue of mixed questions of law and fact in federal habeas corpus proceedings. The Petition for Writ of Certiorari should be denied.

Respectfully submitted,



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177 North Church Avenue  
909 Transamerica Building  
Tucson, Arizona 85701

Attorney for Defendant

March 16, 1983

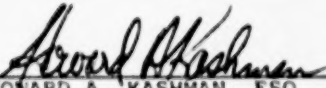
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CERTIFICATE OF SERVICE

I hereby certify that on the 16th day of March, 1983, a copy of Respondent's Brief in Opposition to Petition for A Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit was mailed, postage prepaid, to counsel for the Petitioners, to-wit:

Carmine A. Brogna  
Special Deputy Pima County Attorney  
5151 East Broadway, Suite 700  
Tucson, Arizona 85711

I further certify that all parties required to be  
served have been served.

  
\_\_\_\_\_  
HOWARD A. KASHMAN, ESQ.  
177 North Church Avenue  
909 Transamerica Building  
Tucson, Arizona 85701  
(602) 622-6793

Attorney for Respondent

**APPENDIX**

**IN THE SUPERIOR COURT OF THE STATE  
OF ARIZONA**

**IN AND FOR THE COUNTY OF PIMA**

**NO. A-19672                      July 8, 1971**

**THE STATE OF ARIZONA,**

**Plaintiff,**

**VS.**

**LOUIS C. TAYLOR,**

**Defendant.**

**MINUTE ENTRY**

**JACK G. MARKS, Judge**

The court, having taken under advisement at the conclusion of the preliminary hearing on June 17, 18, 23, 24, 29, 30 and July 2, 6 and 8, 1971, the motions of the defendant Louis C. Taylor (1) to disregard the evidence of statements made by the defendant Louis C. Taylor to members of the Police Department of the City of Tucson, Arizona, on December 20, 1970, at the Headquarters of the Tucson Police Department in said city, because the said statements were not voluntary as a matter of law. . .and having considered the evidence and the law and having concluded that the doctrine of "fundamental fairness" as enunciated by the Supreme Court of the State of Arizona in State v. Councilman, 1969, 105 Ariz. 145, 460 P.2d 640; State v. Cano, 1968, 103 Ariz. 37, 436 P.2d 586; and State v. Maloney, 1967, 102 Ariz. 495, 433 P.2d 625, requires that such statements may not be used in evidence in the Superior Court sitting as a criminal court following the transfer of a juvenile from the juvenile court to the criminal court for prosecution when the defendant and his parents were not advised

that the juvenile may be held to answer at a trial as an adult, the evidence disclosing that Officer Louis D. Adams (at no time subsequent to reading to the defendant Louis C. Taylor the constitutional "rights card", Miranda V. Arizona, 1966, 384 U.S. 436, 86 S. Ct. 1602, 16 L.Ed. 2d 694, 10 A.L.R.3d 974, at or about 3:30 o'clock A.M. on December 20, 1970, knowing that the defendant Louis C. Taylor was sixteen (16) years of age and, therefore, a juvenile) made no effort to notify the parents of Louis C. Taylor that he was at that time deemed by Officer Adams to be a suspect as to the crimes of arson and murder in connection with the fire at the Pioneer International Hotel at Tucson, Arizona, which commenced at or about midnight on December 19, 1970, or immediately thereafter, all as more fully set forth in the felony complaint filed in this Court on June 11, 1971, and, further, because Officer Adams did not warn the Defendant Louis C. Taylor (or his parents) that any statements made by him thereafter to police officers may be used against him in a criminal prosecution in this court with respect to the said crimes of arson and murder heretofore described; now, therefore, it is

ORDERED that the defendant's motion to disregard all statements made to the Tucson Police Department Officers be, and the same hereby is, granted to the extent that evidence as to statements made by the defendant Louis C. Taylor subsequent to the reading of the said "rights card" by Officer Adams to the defendant Louis C. Taylor at or about the aforesaid place and time has been disregarded by the court in its determination of probable cause.

\* \* \*

IN THE SUPERIOR COURT OF THE STATE  
OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

NO. CR-69983  
(Pima County No. A-19672)

THE STATE OF ARIZONA,

Plaintiff,

vs.

LOUIS C. TAYLOR,

Defendant.

October 26, 1971

CHARLES L. HARDY, Judge

\* \* \*

The Court finds that the defendant came in custody at the point when Officer Adams warned him of his Miranda Rights and that any statements made by him after that are not admissible because in addition to the Miranda Rights his parents should have been notified that he was in custody and their consent should have been obtained.

The Court finds that this hearing is in the nature of a Motion to Suppress.

\* \* \*

---

THE STATE OF ARIZONA,

Petitioner,

vs.

CHARLES L. HARDY, JUDGE OF THE  
SUPERIOR COURT OF THE STATE OF ARIZONA,  
IN AND FOR THE COUNTY OF MARICOPA,

Respondent,

LOUIS C. TAYLOR,

Real Party in Interest.

No. 10673  
Supreme Court of Arizona,  
In Banc

December 1, 1971

HAYS, Vice Chief Justice:

A Petition for Special Action was brought by the Pima County attorney, alleging that the trial court had exceeded its jurisdiction in barring statements of the defendant Taylor, made after he came in custody. The defendant, who was 16 years of age at the time of the alleged statements, after a transfer hearing, was charged as an adult with one count of arson and twenty-eight counts of murder. This court accepted jurisdiction of the Special Action.

The petitioner contends that the trial court's ruling barring defendant's statements was based on the fact that his parents were not present when he waived his Miranda rights, nor did they consent thereto. Petitioner argues that Rule 18 of the Rules of Procedure of the Juvenile Court, 17 A.R.S., is controlling, rather than the holding in our previous decision in *State v. Maloney*, 102 Ariz. 495, 433 P.2d 625 (1967). Rule 18 reads as follows:

#### "Statement of a Child

No extra-judicial statement to a peace officer or court officer by the child shall be admitted into evidence in juvenile court over objection unless the person offering the statement demonstrates to the satisfaction of the court that: The statement was voluntary and before making the statement the child was informed and intelligently comprehended that he need not make a statement, that any statement made might be used in a court proceedings, and that he had a right to consult with counsel prior to making a statement and during the taking of the statement, and that, if he or his parents, guardian or custodian could not afford an attorney, the court would appoint one for him prior to any questioning."

An examination of the trial court's order at the close of the admissibility or suppression hearing indicates that the court ruled that the parents should have been notified and their consent should have been obtained.

We hold the Rule 18, supra, sets the standards for the admission of the statement of a child. The presence of the child's parents or their consent to a waiver of rights is only one of the elements to be considered by the trial court in determining that the statement was voluntary and the child intelligently comprehended his rights. To the extent that this position deviates from State v. Maloney, supra, that decision is overruled.

It is ordered that the previous ruling of the Superior Court barring the statements of the defendant, Taylor, is set aside. This matter is remanded to the Superior Court for a ruling on the admissibility or suppression hearing consistent with the decision heretofore enunciated, and for further appropriate proceedings.

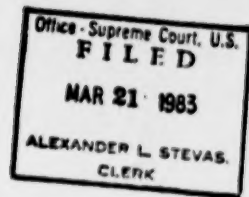
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NO. 82-1496

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982



HAROLD CARDWELL and THE ATTORNEY  
GENERAL OF THE STATE OF ARIZONA

Petitioners

VS.

LOUIS CUEN TAYLOR,

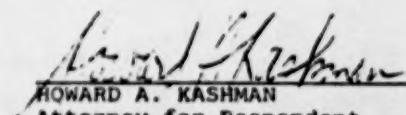
Respondent

**MOTION FOR LEAVE TO PROCEED  
IN FORMA PAUPERIS**

Respondent, LOUIS CUEN TAYLOR, pursuant to Rule 46, United States Supreme Court Rules, and 28 U.S.C. §1915, as amended, respectfully moves the Court for an order permitting him to proceed in this Court in forma pauperis with his Brief in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit herein, without prepayment of fees and costs or security therefor, on the grounds that he is unable to pay such costs or give security therefor.

Respondent has heretofore been granted leave to proceed in forma pauperis in the United States Court of Appeals for the Ninth Circuit.

DATED this 16th day of March, 1983.

  
HOWARD A. KASHMAN  
Attorney for Respondent  
177 North Church Avenue  
909 Transamerica Building  
Tucson, Arizona 85701

- O R D E R -

Let the Respondent proceed without prepayment of costs or fees or the necessity of giving security therefor.

DATED this \_\_\_\_ day of \_\_\_\_\_, 1983.

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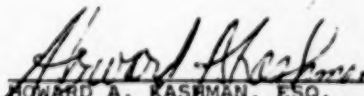
UNITED STATES SUPREME  
COURT JUSTICE

- C E R T I F I C A T E   O F   S E R V I C E -

I hereby certify that on the 16th day of March, 1983, a copy of Respondent's Motion for Leave to Proceed in Forma Pauperis and Affidavit to Accompany Motion for Leave to Appeal in Forma Pauperis was mailed, postage prepaid, to counsel for the Petitioners, to-wit:

Carmine A. Brogna  
Special Deputy Pima County Attorney  
5151 East Broadway, Suite 700  
Tucson, Arizona 85711

I further certify that all parties required to be served have been served.

  
HOWARD A. KASHMAN, ESQ.  
Attorney for Respondent  
177 North Church Avenue  
909 Transamerica Building  
Tucson, Arizona 85701

NO. \_\_\_\_\_

IN THE  
SUPREME COURT OF THE UNITED STATES  
October Term, 1982

HAROLD CARDWELL and THE ATTORNEY  
GENERAL OF THE STATE OF ARIZONA

Petitioners

vs.

LOUIS CUEN TAYLOR,

Respondent

**AFFIDAVIT TO ACCOMPANY MOTION FOR LEAVE TO  
APPEAL IN FORMA PAUPERIS**

State of Arizona     )  
                              ) ss  
County of Pima        )

I, LOUIS CUEN TAYLOR, being first duly sworn, depose and say that I am the Respondent in the above-entitled case; that in support of my motion to respond to the Petition for Writ of Certiorari herein without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; and that I believe I am entitled to redress.

1. I am not presently employed and have never been employed on a full-time basis. I am have been incarcerated since March, 1972.

2. Within the past twelve months I have not received any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends or other source.

3. I do not own any cash or checking or savings accounts.

4. I do not own any real estate, stocks, bonds, notes, automobiles or other valuable property.

5. There are no persons who are dependent upon me for support.

I understand that a false statement in this Affidavit will subject me to penalties for perjury.

  
LOUIS CUEN TAYLOR

SUBSCRIBED AND SWORN to before me this \_\_\_\_ day of March, 1983, by LOUIS CUEN TAYLOR.

  
NOTARY PUBLIC

My Commission Expires:

10/19/85

